Supreme Court, U.S.
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No. 91-87

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL SCHMIDT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

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The Government, and the lower Courts, take the position that the knowledge of a German soldier who guards the outside of a German prison is irrelevant; that he must be denaturalized because he was German soldier and because he did escort prisoners to places of work in the civilian community during World War II from a prison called "Sachsenhausen".

Michael Schmidt has testified that he harmed no one, that no one was harmed in his presence, that he never saw a prisoner die, and that he was never inside, and never saw inside, Sachsenhausen. No affidavit contradicts this testimony.

Against this, and with such overwhelming power that summary judgment was granted, the Government argues that fifteen prisoners were executed *inside* the prison (including two Jewish persons) and that Sachsenhausen was, indeed, a cruel prison. None of this is alleged to have been known to Michael Schmidt, and he says, under oath, that he did not know of it. He was outside, that was inside.

And, Schmidt also testified that his unit was a combat unit trained as such which, after a time at the prison near Berlin, went into combat, at which point he was wounded.

We do, thus, have a case in which a person is denaturalized without any finding that he did anything morally wrong.

The Government brief does not answer this point; it argues, rather, that the Nazi regime was morally wrong (an easy point to make) and that Schmidt was there (which he was). From that comes summary judgment.

I.

THERE IS NO AUTHORITY EXCEPT THE SEVENTH CIRCUIT FOR THE PROPOSITION THAT THE DISPLACED PERSONS ACT IS A STRICT LIABILITY STATUTE.

The Government argues that the Displaced Persons Act requires nothing beyond proof of presence as a member of a guard unit at Sachsenhausen during World War II. All else is irrelevant, and the Seventh Circuit, and the trial judge, specifically so hold and agree.

No other circuit, and no other court, has so ruled. The prior Seventh Circuit cases, cases in which the Germans did identifiable acts of cruelty, did contain language which could support such a construction of *Fedorenko*, but no

other cases so hold. *Fedorenko v. United States*, 449 U.S. 490 (1981).

And, the present holding, and its result, removes from the naturalized citizen even the protections afforded by the case law on visa fraud; we now have a strict liability statute based on presence, and so the teachings of *Kungys* would not apply. *Kungys v. United States*, 485 U.S. 759 (1988).

The Government argues visa fraud in its Brief in Opposition, but this is not a visa fraud case; it is a summary judgment case in which there is an issue of fact, and nothing more. Only by imposing strict liability based on presence and membership can it be argued that there is no material issue of fact.

II.

THE CONFLICT BETWEEN THE CIRCUITS REMAINS.

The Government argues that *United States v. Paal*, Slip Op. No. 90-10480 (9th Cir. July 5, 1991) overrules *Laipenieks v. INS*, 750 F.2d 1427 (9th Cir. 1985), thus reducing the conflict to a conflict between the Second and Seventh Circuits.

United States v. Paal is a conviction under 18 U.S.C. sec. 1001. The defendant was convicted after a criminal trial, of a violation of 18 U.S.C. sec. 1001 for making a false statement in a visa application. Paal had a full hearing, and was found to have wilfully lied on a visa application.

Laipenieks was a deportation case, and the question related to his actions in persecuting Communists, and it was held that the evidence of persecution was, as a matter of law, insufficient. *Laipenieks*, plainly, stands.

CONCLUSION

A person should not be denaturalized on a status test. Issues of fact exist, knowledge should be considered, and Michael Schmidt should have a trial. We pray that the writ issue.

Respectfully submitted,

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